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No. 20,428

FEB 10 1967

United States
COURT OF APPEALS
for the Ninth Circuit

ARTHUR ANDERSON and CLATSOP
FISHERIES, INC., an Oregon corporation,

Appellants,

v.

GENE R. NADON, DOROTHY IRENE
NADON, and JATABORO CORPORATION,
a corporation,

Appellees.

BRIEF OF APPELLANTS

*Appeal from the United States District Court
for the District of Oregon*

FILED

NOV 5 1966

HOWARD H. SCHMIDT, CLERK

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JURISDICTION

This appeal arises out of limitation of liability proceedings, 46 U.S.C. § 183 *et seq.*

Respondent-appellant Clatsop Fisheries, Inc., was the owner of the F/V BETTY which was lost at sea after a collision with the F/V EAGLE on December 6, 1964 (R. 20). Respondent-appellant Arthur Ander-

son is the president of Clatsop Fisheries, Inc. and was the skipper of the F/V BETTY (R. 22). Petitioners-appellees allege that they are the owners and operators of the F/V EAGLE (R. 1).

On June 4, 1965, the petitioners filed a "Petition for Exoneration from or Limitation of Liability as Owners of F/V EAGLE" in Admiralty in the United States District Court for the District of Oregon, alleging, *inter alia*, the fact of the collision between the F/V EAGLE and the F/V BETTY on December 6, 1964, and that the F/V EAGLE was within the District of Oregon (R. 1). The marshal served the Petition and Monition on respondents-appellants at Astoria, Oregon, on June 5, 1965 (R. 15, 16).

Respondents-appellants filed their Claim and Answer (R. 17). Respondents-appellants also filed a Stipulation and Motion (R. 20) requesting leave to proceed with a determination of petitioners' liability for the loss of the F/V BETTY in the Circuit Court of the State of Oregon for Clatsop County, agreeing to a determination of petitioners' right to limitation by the District Court. Clatsop Fisheries also filed a priority consent (R. 27) agreeing to payment of all claims before any payment to Clatsop Fisheries, Inc.

The motion to dissolve the injunction was heard on August 3, 1965 (Vol. II, R.).

On August 10, 1965, the court entered its Order (R. 29) denying the Motion of respondents. On August 23, 1965, respondents filed a Notice of Appeal (R. 31).

The District Court had jurisdiction by virtue of the provisions of 46 U.S.C. § 185.

This Court has jurisdiction by virtue of the provisions of 28 U.S.C. § 1292 (a) (1) and (3).

STATEMENT OF THE CASE

Individual petitioners allege that they are residents of Clatsop County, Oregon, and part owners of the F/V EAGLE. The home port of the F/V EAGLE is Astoria, Oregon. The petitioner Jataboro Corporation alleges that its principal place of business is located in Astoria, Clatsop County, Oregon (R. 1-2) and that it also is an owner of the F/V EAGLE.

At the time of the collision between the F/V EAGLE and the F/V BETTY the individual respondents were the only persons aboard the F/V BETTY.

The Order for Monition and Monition require all claimants to appear before July 13, 1965, and assert their claims.

The marshal's returns show that the respondents were all served in Clatsop County, Oregon (Astoria and Warrenton) (R. 13-16).

The only claim filed is that of appellants Clatsop Fisheries, Inc. and Arthur Anderson (R. 17). The crew of the F/V BETTY, Riley Linville and Uno Winters, have renounced any claim against the F/V EAGLE (R. 23, 24). Clatsop Fisheries seeks reimbursement of amounts paid to Linville and Winters.

The appellants requested that Clatsop Fisheries be permitted to proceed against the petitioners in the Circuit Court of the State of Oregon in Clatsop County. Appellants agreed that if Clatsop Fisheries were so allowed to proceed, the petitioners' right to limitation would not be litigated in the state court (R. 21).

Upon exception by the petitioners (Vol. II, R. 4-6) that there were multiple claims and an inadequate fund, Clatsop Fisheries, Inc. filed a priority consent agreeing that the three small claims for crew members could be paid in full by the District Court out of the limitation fund (R. 27-28).

The District Court refused to permit Clatsop Fisheries, Inc. to proceed with its claim for loss of the BETTY against the petitioners in the state court (R. 29, 30) and appellants request that the District Court be ordered to allow Clatsop Fisheries, Inc. to proceed in the state court.

SPECIFICATION OF ERROR

The District Court erred in refusing to allow Clatsop Fisheries, Inc. to prosecute in the state court its claim against petitioners for loss of the BETTY.

SUMMARY OF ARGUMENT

The appellants' stipulation agreeing to determination of the right to limitation in the District Court, the disclaimers of crew members, and the priority consent of the vessel owner, adequately protect petitioners' right

to limitation, thus entitling the single remaining claimant, Clatsop Fisheries, Inc., to pursue its claim against petitioners in the common law forum.

ARGUMENT

State Court Jurisdiction

Admiralty jurisdiction has never been held to be within the exclusive realm of the United States District Court sitting in admiralty.¹

The "saving to suitors" clause was enacted in 1789 as part of the Judiciary Act and is as viable today as it has ever been.²

The "saving to suitors" clause was discussed by the Supreme Court in *Madruga v. Superior Court*, 346 U.S. 556 (1954). In the *Madruga* case, the power of the California courts to order partition of a ship was brought into question. In upholding the jurisdiction of the state court, the Supreme Court, Mr. Justice Black speaking, said:

"Admiralty's jurisdiction is 'exclusive' only as to those maritime causes of action begun and carried on as proceedings *in rem*, that is, where a vessel or thing is itself treated as the offender and made

¹ The Constitution of the United States provides that: "The judicial Power shall extend * * * to all Cases of admiralty and maritime Jurisdiction; * * *" U.S. Const. Art. III, § 2.

² "The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

"(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

"(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize." 28 USC § 1333.

the defendant by name or description in order to enforce a lien." 346 U.S. at 560.

The Oregon Supreme Court has long recognized that its jurisdiction is limited to *in personam* claims. See *Portland Butchering Co. v. The WILLAPA*, 25 Or. 71, 34 Pac. 689 (1893).

In this case Clatsop Fisheries, Inc. desires to institute an action against the owners of the F/V EAGLE, not the F/V EAGLE herself. Such an action would be *in personam* and within the jurisdiction of the state court.

Appellants have found no authority for the proposition that there is an exception to the state court's *in personam* jurisdiction in collision cases. Furthermore, there is no reason to suspect that the Oregon courts will not properly apply maritime law to this case. The Oregon courts decide longshoremen versus shipowner cases on the basis of the maritime law announced by the United States Supreme Court. See e.g. *Lang v. Coastwise Line*, 206 Or. 667, 294 P.2d 341 (1956). Actions brought by seamen against shipowners are decided on the basis of federal maritime law, i.e., the Jones Act. See e.g. *Lazari v. States Marine Corp.*, 220 Or. 379, 349 P.2d 857 (1960).

The Circuit Court of Clatsop County, Oregon, is competent to hear and determine an action brought by the owners of the F/V BETTY against the owners of the F/V EAGLE.³

³ Although not a *forum non conveniens* question, it is to be noted that the Clatsop County Circuit Court sits in Astoria and is thus the convenient forum for the trial of this case.

The Limitation Act

The Limitation Act does not have for its purpose the denial of the injured party's right to a jury trial in a state court forum competent to hear the case. It has for its purpose limitation of an owner's liability to his investment in the *res* and, where the *res* is inadequate, equitable apportionment among all claimants. *Lake Tankers Corporation v. Henn*, 354 U. S. 147 (1957); *Langnes v. Green*, 282 U.S. 531 (1931).

In the instant case, therefore, if the limitation rights of the owners of the F/V EAGLE can be assured and if there is no question of proper apportionment among claimants, the owner of the F/V BETTY should be allowed to proceed in the state court.

The only possible claimants, as appears by the petition for limitation, are the owner of the F/V BETTY and her Master and two-man crew. The time for filing claims expired on July 13, 1965 (R. 9). The owner, Clatsop Fisheries, Inc. and the Master, Arthur Anderson, appeared. Clatsop Fisheries, Inc. as trustee, settled with the crew and holds their claims (R. 25, 26). The crew of the F/V BETTY expressly disclaims any personal claim against the F/V EAGLE or her owners (R. 23, 24).

The appellants have agreed:

"1. Respondents will not claim as *res judicata* the personal liability of petitioners established in the State Court action but agree that this Court may subsequently determine the issue of petitioners' privity and knowledge and right to limit their

liability to their interest in the F/V EAGLE and her cargo as by Revised Statutes of the United States may be allowed; and

"2. Respondents will not seek to enforce and collect any judgment against petitioners herein which respondents may obtain in the aforesaid Clatsop County Circuit Court except in and through these proceedings after due appraisal of the F/V EAGLE and the granting or denying of the Petition for Exoneration from or Limitation of Liability." (R. 21, 22)

Clatsop Fisheries, Inc. has further agreed:

"* * * that any claims filed on behalf of Uno Winters and Riley Linville, crew members aboard the F/V BETTY, or on behalf of Arthur Anderson, Master of the F/V BETTY, as such claims may be fixed by this Honorable Court, should be deducted and paid out of available funds before the payment of any Judgment recovered by respondent Clatsop Fisheries, Inc. in its proposed State Court action." (R. 27)

As further assurance to petitioners of their limitation rights, appellants agreed through their counsel:

"* * * We represent all of the claimants and we are prepared to file either a priority consent that those other three small claims may be paid in full out of any limitation fund, or we are prepared, if your Honor feels it is necessary, to disclaim completely the other three claims, which are all very minor, small claims." (Vol. II, R. 4)

It thus appears that the District Court is authorized by stipulation to pay up to the full amount of the

losses suffered by the Master and crew of the F/V BETTY and if limitation is ultimately allowed, the liability of petitioners will be limited to the value remaining. If consideration of the claims of the Master and crew of the F/V BETTY is any threat to petitioners' limitation rights, appellants have agreed that the claims be disregarded, leaving only the claim of Clatsop Fisheries, Inc. Every possible right granted by the Limitation Act to petitioners is protected and guaranteed.

Concourse is a prime function of limitation proceedings to provide for equitable apportionments of an inadequate fund, but where there is no need for concourse, either because there is only one claimant or because there is no dispute among the claimants as to amounts or payment, as here, or one claimant agrees to full payment, as here, the petitioner is not entitled to concourse. As the Supreme Court stated:

"The State proceeding could have no possible effect on the petitioner's claim for limited liability in the admiralty court and the provisions of the Act, therefore, do not control. *Langnes vs. Green*, 282 U.S. 531, 539-540. It follows that there can be no reason why a shipowner, under such conditions, should be treated any more favorably than an airline, bus, or railroad company. None of them can force a damage-claimant to trial without a jury. They, too, must suffer a multiplicity of suits. Likewise, the shipowner, so long as his claim of limited liability is not jeopardized, is subject to all common-law remedies available against other parties in damage actions. The Act, as we have said,

was not adopted to insulate shipowners from liability but merely to limit it to the value of the vessel and the pending freight. It is contended that *Maryland Casualty Co. vs. Cushing*, 347 U.S. 409, is to the contrary. While there was no opinion of the Court in that case, it involved an alleged clash between Louisiana's direct action statute and the Act. The majority concluded there was no clash. The amount of the claims there far exceeded the value, if any, of the vessel and the pending freight. The language in one opinion to the effect that *concur-sus* is 'the heart' of the limitation system therefore refers to those cases where the claims exceed the value of the vessel and the pending freight. In that event, as we have pointed out, the *concur-sus* is vital to the protection of the offending owner's statutory right of limitation. But this is not to say that where *concur-sus* is not necessary to the protection of this statutory right, that it is nonetheless required." *Lake Tankers Corporation v. Henn*, 354 U.S. 147 at 153, 154.

There are two matters that may ultimately have to be decided by the Admiralty Court.⁴ The sequence of decision of these two matters is probably not important. One matter is whether the owners of the F/V EAGLE are entitled to limitation and, if so, the value of the F/V EAGLE. Appellants contest both the right to limitation and valuation but concede the Admiralty Court's

⁴ These matters are whether limitation will be allowed and the valuation of the F/V EAGLE. It is to be noted that this court has approved an order permitting a state court determination of liability and the value of the petitioner's vessel. *Red Bluff Bay Fisheries, Inc. v. Jurjev*, 109 F.2d 884 (C.A. 9, 1940). Appellant does not seek such a broad order.

jurisdiction to decide the two issues. Appellants desire and are entitled to try to a jury the issue of the amount of damages to Clatsop Fisheries, Inc. occasioned by the loss of the F/V BETTY and the petitioners' liability for the loss. The question of the amount which Clatsop Fisheries, Inc. will ultimately realize on any judgment entered in the state court will, of course, depend on the valuation of the F/V EAGLE and if the valuation is less than the judgment, whether limitation is allowed. The District Court may never have to decide the merits of the limitation claim because if Clatsop Fisheries recovers a judgment less than the stipulated value (\$35,000), the right to limitation and valuation would become moot.

In its opinion, the District Court found that the "statutory scheme" would be violated by granting appellant's request to proceed in the state court (R. 29). The court relied on *Pershing Auto Rentals, Inc. v. Gaffney*, 279 F.2d 546 (C.A. 5, 1960).

In the *Pershing Auto* case there were four claimants seeking a grand total of \$558,000. The vessel involved was a total loss. Two of the claimants sought leave to proceed in the state court; two did not do so. There were no disclaimers executed, as here, by crew members Linville and Winters. There was no priority consent filed, as here, by Clatsop Fisheries, Inc.⁵ As a

⁵ In the case of *Moran Transportation Corporation v. Adm'x of Vitorio Mellino*, 185 F.2d 386 (C.A. 2, 1950), the court held that the filing of a priority consent assured apportionment of the fund, therefore entitling the claimant to liquidate her claims in the state court.

matter of fact, the Court of Appeals, speaking through Judge Brown, after deciding it would be improper to dissolve the lower court's injunction, concluded its opinion by noting that after limitation was granted or denied in admiralty, the claimants would be allowed to proceed, if they desired, with a jury trial in the state court.⁶ Clatsop Fisheries, Inc. wishes to have the state court trial first as is its right confirmed by *Lake Tankers Corporation v. Henn*, *supra*, and *Langnes v. Green*, *supra*.

CONCLUSION

The order should be vacated and the case remanded with instructions to allow Clatsop Fisheries, Inc. to proceed with its state court action against owners of the F/V EAGLE for loss of the F/V BETTY.

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Attorneys for Appellants

⁶ This right to an eventual jury trial in the state court may or may not be acknowledged by the trial court in this case. See e.g. *Petition of Sause Bros. Ocean Towing, Inc.*, 193 F. Supp. 14 (D.C. Or., 1960).

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

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Attorney

